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IN THE

United States Supreme Court

OCTOBER TERM, 1964

No. 402

HENRY WASMUTH, ROBERT A. DAVIS, DANIEL McGAURN and LEONARD FELDMAN, suing on behalf of themselves and all other chiropractors in the State of New York who are similarly situated,

Plaintiffs-Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, and THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the Court of Appeals of the State of New York, entered on July 10, 1964, affirming an order of the Appellate Division of the State of New York for the Second Judicial Department, entered June 1, 1964, which affirmed an order of the Special Term of the Supreme Court, County of Westchester, entered April 6, 1964, dismissing the complaint, without a trial, for failure to state a cause of action and adjudging that Article 132 of the New York Education Law is in all respects constitutional and valid. Appellants submit this Statement to show that the Supreme Court of the United

States has jurisdiction of the appeal and that substantial federal questions are presented under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Opinions Below.

The opinion of the Special Term of the Supreme Court, County of Westchester, is reported in 43 Misc. 2d 14, 250 N. Y. S. 2d 11. The Appellate Division of the Supreme Court rendered no opinion. The opinion of the Court of Appeals is not yet reported. Copies of the opinions rendered by the Special Term of the Supreme Court and by the Court of Appeals are attached hereto as Appendices A and B, respectively.

Jurisdiction.

This action, insofar as concerns this appeal, is for a declaratory judgment that specified provisions of Article 132 of the New York Education Law (which provides for the licensing and regulation of chiropractors) are invalid under the Fourteenth Amendment to the Constitution of the United States. The action was brought pursuant to Section 3001 of the New York Civil Practice Law and Rules. The judgment of the Court of Appeals was entered on July 10, 1964, and the Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of New York, Westchester County, on July 27, 1964.

The jurisdiction of the Supreme Court of the United States to review this judgment on appeal is conferred by Title 28, United States Code, §1257(2). The following decisions sustain the jurisdiction of the Supreme Court to

review the judgment on appeal: *Winters* v. *New York*, 333 U. S. 507; *Schroeder* v. *City of New York*, 371 U. S. 208; cf. *Bryant* v. *Zimmerman*, 278 U. S. 63.

The Statute.

The statute the validity of which is challenged in this action is Article 132 of the Education Law of New York, more particularly §6552, subd. 2, which by cross-reference to §6507, requires that candidates for chiropractic licenses pass examinations prepared for candidates for medical licenses.

The statute is chapter 780 of the New York Laws of 1963. It is printed in the "Cumulative Annual Pocket Part" of McKinney's Consolidated Laws, Education Law.

All provisions relevant to the present appeal are quoted in Appendix C.

The somewhat intricate statutory scheme is explained in "Statement of Facts" in which are set forth excerpts from the statute to show the basis for appellants' challenge to it.

Questions Presented by this Appeal.

1. May a State, without any showing or proof, forbid the practice of chiropractic in the absence of a "thorough" knowledge of medicine, against the claim that such knowledge bears no reasonable relation to chiropractic?

[As demonstrated *infra* pages 12-13, the identical question was answered in the negative by the United States Court of Appeals for the Fifth Circuit in *England* v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626, rehearing denied, 263 F. 2d 661. This Court has twice

left that decision in effect, first, by denying certiorari, 359 U. S. 1012, and, second, by directing in January of this year that the trial proceed despite an intervening state court decision on the same issue, 375 U. S. 411.]

2. May a State, without any showing or proof, forbid the practice of chiropractic in the absence of a demonstration of "thorough" knowledge of medicine against both the claim that such knowledge bears no reasonable relation to chiropractic and a prohibition by the State against the use of such knowledge?

[This question is framed to bring out the further element, not present in *England*, that New York forbids chiropractors to use the medical knowledge that they are required to demonstrate, thereby recognizing, appellants submit, that such knowledge bears no reasonable relation to chiropractic.]

3. May a State, without any showing or proof, require only practitioners of chiropractic to pass examinations in the use and effects of X-ray, against the claim that it is discriminatory in that other practitioners of healing arts use X-ray more than chiropractors?

[No claim is made that such a requirement is unreasonable, or lacks Due Process. Appellants invoke the Equal Protection Clause only.]

Statement of the Facts.

Chiropractic is a healing art limited to the manual or mechanical correction of nerve interference caused by distortions of the vertebral column. Chiropractic does not use drugs, medicines, hormones, sera, chemicals, or electrical devices; does not treat infectious diseases, cancer, diabetes, heart or kidney disease, or physical injuries, and

does not concern itself with surgery, obstetrics or gynecology, or medical specialties such as ophthalmology.

The statute adopts the foregoing definition of chiropractic (Education Law, Article 132, §6550, subd. 4, affirmatively defines chiropractic; §6558, subd. 1-3, states the limitations). Nevertheless the statute requires a demonstration of the same knowledge of diseases and techniques foreign to chiropractic as is required of candidates for medical licenses (§6552, subd. 2, referring to Article 131, §6507), in the subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis. Defendants have so construed the statute.

The Statute.

Article 132 of the Education Law restricts the practice of chiropractic to licensed practitioners effective October 1, 1964 (§6561).

The requirement of "thorough" medical knowledge for chiropractic license is imposed by §6552, by cross-reference to §6507 and 6508, these sections being in Article 131 of the Education Law, relating to medicine. §6552, subd. 1 and 2 provide:

> "1. All applicants shall be required to pass written examinations in clinical chiropractic analysis, X-ray as it relates to chiropractic analysis, and the practice of chiropractic, and a written examination in the following basic subjects*: anatomy, physiology, chemistry, hygiene, bacteriology, pathology, diagnosis and the use and effects of X-ray.

* The requirement in subdivision 2 that the department shall use questions for the same subjects in the medical examinations given pursuant to §6507 makes the expression "basic subjects" a misnomer. Examinations in medicine, relating as they do to diseases and techniques foreign and forbidden to chiropractic, cannot be "basic" to chiropractic.

"2. Examinations shall be administered by the department. The board shall prepare and submit to the department, as required, lists of questions for the examinations in clinical chiropractic analysis, the use and effects of X-ray, and practice of chiropractic. The department may select questions from such lists for such examinations. *In the examinations in the basic subjects the department shall use the questions prepared for the same subjects in the examination pursuant to sections sixty-five hundred seven and sixty-five hundred eight of this title.*"

The word "applicants" is used in the foregoing quotation in general terms and without definition. By §6556, subd. 4, present practitioners of chiropractic with less than two years' experience are specifically required to pass the examinations referred to in §6552. By §6556, subd. 3, b, the department is authorized to require the same examinations of practitioners of less than seven but more than two years' experience. By §6556, subd. 2, the department is authorized to require the same examinations in anatomy and physiology of practitioners of less than fifteen and more than seven years' experience.

§§6507 and 6508, are, as we have noted, in Article 131 relating to medicine.

§6507 provides:

"The board† shall submit to the department as requested, lists of suitable questions for *thorough* examination in anatomy, physiology, preventive medicine and public health, chemistry, surgery, obstetrics, gynecology, pathology, micro-biology and medicine and diagnosis. From these lists the department shall prepare question papers for all such subjects, which at any examination shall be the same for all candidates, except that the examination may be

† Referring to the State Board of Medical Examiners.

divided as provided in section sixty-five hundred six."

For the scope of these examinations reference must be made to §6501, subd. 4, by which the holder of a medical license may:

> ". . . diagnose, treat, operate, or prescribe for *any human disease,* pain, or injury, deformity or physical condition . . . [and may use] *any means or method* [in so doing]."

Necessarily therefore examinations pursuant to §6507 cover the diseases and techniques foreign and forbidden to chiropractic.

Although §6552, subd. 2, directs that the questions in the hygiene and bacteriology examinations shall be questions prepared for the examinations under §6507, in 1959 the Legislature amended §6507 so as to rename the hygiene examination "preventive medicine and public health" and to rename the bacteriology examination "micro-biology". Laws of 1959, chapter 38. Apparently the draftsman of Article 132 had the earlier version before him. Defendants' hygiene examination as subsequently given to chiropractic candidates had the same scope as the §6507 examinations now being given in public health and the bacteriology examination as in micro-biology. They were both medical examinations relating to diseases and techniques foreign to chiropractic, as we note *infra* pages 9-10.

The statutory definition of chiropractic is, as we have stated, extremely limited and specifically excludes most diseases commonly treated, and most techniques commonly used, by medical doctors.

Chiropractic is affirmatively defined in §6550, subd. 4 as follows:

4. "'The practice of chiropractic' means a method of detecting and correcting, by manual or mechanical means essential to the practice of chiropractic, structural imbalance, distortion, or subluxation in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxations of or in the vertebral column."

The limitations on chiropractic are found in §6558.

Subd. 1 of §6558 provides that a chiropractic license permits only "the practice of chiropractic."

By subd. 2 of §6558 "the practice of chiropractic is declared not to be the practice of medicine."

Subd. 3 provides that a chiropractor is *not* permitted:

"a. to practice obstetrics, psychiatry or any medical, surgical or paramedical specialty or subspecialty;

"b. to perform surgery of any kind or to reduce fractures or dislocations;

"c. To treat for any of the following conditions: any infectious diseases such as pneumonia, any communicable diseases listed in the sanitary code of the state of New York, any of the cardio-vascular-renal or cardio-pulmonary diseases, any surgical condition of the abdomen such as acute appendicitis, or diabetes, or any benign or malignant neoplasms;

"d. to prescribe, administer, dispense or use in his practice biologicals, drugs, medicines, sera, vaccines or hormones;

"e. to use any diagnostic or therapeutic methods involving chemical or biological means or the use of electrical devices, except those devices approved by the board as being essential to the practice of chiropractic; or

"f. to use radio-therapy, fluoroscopy, or any form of ionizing radiation except X-ray . . . [for diagnosis]."

THE EXAMINATIONS.

At the time this action was brought defendants had not given the examinations provided by the statute. Appellants moved for a temporary injunction on the affidavit of Dr. Henry A. Wasmuth, a chiropractor of 27 years' experience. Dr. Wasmuth analyzed the examinations given pursuant to §6507 to candidates for medical licenses in December, 1963. He found that only a negligible proportion of the questions were relevant to chiropractic (R. 47).

The examinations for candidates for chiropractic licenses were given on April 7 and 8 while this case was in the courts.

Upon affidavits annexing copies of these examinations appellants moved for and were granted a stay of the marking of these examinations** (R. 95-96).

These examinations—because, as the statute declares, medicine is not chiropractic—dealt almost entirely with knowledge irrelevant to chiropractic and largely with diseases and techniques from which §6558 expressly excludes chiropractors, viz. infectious diseases, cancer, diabetes, drugs, hormones, chemicals, etc. Illustrative questions are:

Bacteriology

"42. Passive immunity to diphtheria is best established by the administration of:

1. Alum-precipitated toxoid.
2. Diphtheria antitoxin.

** This stay expired with the decision of the Court of Appeals. Both the Court of Appeals and Mr. Justice Harlan refused to continue it.

3. Diphtheria convalescent serum.

4. Toxin-antitoxin.

5. Diphtheria toxoid" (R. 190).

Pathology

"35. A lesion that is rarely found in mediastinal lymph node is:

1. Lymphosarcoma.

2. Hodgkin's disease.

3. Tuberculosis.

4. Lymphangioma.

5. Boeck's sarcoid" (R. 205).

Physiology

"17. The one true statement about the relationship of various endocrine factors in diabetes is that:

1. Simultaneous hypophysectomy and pancreatectomy increase the severity of previously existent diabetes.

2. Insulin has no effect on diabetes produced by pituitary extracts.

3. The diabetogenic activity of the hypophysis is confined to the posterior pituitary.

4. Anterior pituitary extracts decrease the severity of diabetes.

5. The anterior pituitary and pancreatic islet cells have opposite actions in the production of diabetes" (R. 129).

Although chiropractic candidates were not required to take the examinations in surgery, gynecology and obstetrics, the examinations given did have numerous questions in these subjects, presumably because of the overlap between subjects insofar as medicine is concerned. For

instance, question #23 in Physiology was: "In human reproduction the life of the unimpregnated ovum is estimated at: (five choices)" (R. 131). Question #7 in Hygiene was: "A consent for operation given in clear and direct terms, either orally or in writing, is known as: (five choices)" (R. 162).

X-ray. Chiropractors use X-ray. In view of radiation dangers, the requirement of an examination in its "use and effects" is not unreasonable or lacking in Due Process. But in certain medical specialties (orthopedics and the G. I. series preeminently) X-ray is used more than by chiropractors. The Director of the Office of Radiation Control of the City of New York has been reported in the public press as saying that 85 per cent of the X-ray machines in that City were being operated by physicians whose training "does not come up to Health Department standards." (R. 61-62).

To require X-ray examinations of chiropractors exclusively of the practitioners of the healing arts is, appellants submit, a denial of equal protection.

Raising of Federal Questions.

The federal questions here presented were raised by the complaint (R. 7, 8, 10, 11, 14, 17, 19, 20, 22, 23).

The judgment of the court of first instance, the Special Term, provided: "Adjudged, that Laws of 1963, Chapters 780 and 781, adding Article 132 to the Education Law of the State of New York, are in all respects constitutional and valid" (R. 69).

Appellants' successive notices of appeal to the Appellate Division and the Court of Appeals expressly challenged this adjudication (R. 70, 74).

The opinions of the Special Term and Court of Appeals and the order of affirmance of the Appellate Division all

state that claims that Article 132 of the Education Law are unconstitutional are overruled. Appendices A and B hereto; the order of affirmance of the Appellate Division appears at R. 72-73.

The Federal Questions Presented Are Substantial.

The principal federal question here presented has been decided favorably to appellants' claim within the last few years. *England* v. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626, rehearing denied, 263 F. 2d 661, certiorari denied, 359 U. S. 1012. In the present calendar year this Court for the second time left that decision in effect, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, against the dissent of Mr. Justice Black that no substantial federal question was presented on the merits, 375 U. S. 435.

The Fifth Circuit said at 259 F. 2d 627:

> "... [I]t is claimed that ... a knowledge of surgery and materia medica bear no reasonable relation to the practice of chiropractic*. Without hearing the evidence, we cannot say that these claims are untrue ... We hold simply that the plaintiffs are entitled to a day in court, to an opportunity to prove their case."

Louisiana law has never made any separate provision for chiropractic. An aspiring chiropractor could practice

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* Although the majority opinion refers only to surgery and materia medica, the complaint attacked all the requirements of the applicable statute (R. S. 37:1261 et seq., especially §1271) as irrelevant to chiropractic. Transcript of *England* case Record in this Court, pages 3, 4, 5, 6, 15, 16, 17. The dissenting opinion so notes at 259 F. 2d 628-629. Among those requirements, quoted at 259 F. 2d 629, was passing medical examinations in anatomy, physiology, chemistry, physical diagnosis, pathology, bacteriology and hygiene, e.g., the same requirement embodied in §6552 of the New York statute.

that profession only by passing medical examinations and securing a medical license. In 1927 this Court affirmed a decision of the Louisiana state courts that separate provision for chiropractic could not be compelled under the Fourteenth Amendment: *Louisiana State Board of Medical Exa iners* v. *Fife*, 162 La. 681, affirmed, 274 U. S. 720.

Notwithstanding the *Fife* decision, a chiropractor brought suit in a Federal District Court in Louisiana in 1958 claiming that as chiropractic is presently practiced medical knowledge bore no reasonable relation to chiropractic, and seeking an injunction against interference with him in the practice of his profession. The District Court dismissed the case without a trial. The Fifth Circuit reversed by the decision we have cited above.

In a long opinion denying a petition for rehearing, 263 F. 2d 661, the Fifth Circuit reviewed the leading decisions of this Court regarding the healing arts. *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173; *Graves* v. *Minnesota*, 272 U. S. 425; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, and others.

Commenting on these cases the Fifth Circuit said at 263 F. 2d 664:

> "it is important to note that every one of those cases was decided upon the *evidence*, and not merely upon the *pleadings* as was this case." [Italics in original]

The Fifth Circuit concluded at page 673:

> "We have dwelled at length on the prior case simply to determine if the law has evolved into allowing the State under its police authority substantially to outlaw an apparently useful and beneficent profession with no showing or proof otherwise, for only if that were possible could we affirm the

district court. We determine that the State has no such authority.'"*

New York has gone about it somewhat differently from Louisiana, but the result is the same: to practice chiropractic, it has been made necessary to show medical knowledge.

There are the further elements, however, in New York, viz., that the State, first, has recognized that chiropractic is "a useful and beneficent profession" by making provision for its license, and, second, has recognized that medical knowledge "bears no reasonable relation to the practice of chiropractic" by those provisions of §6558, subd. 1-3, *supra* page 8 forbidding chiropractors from using the medical knowledge that they are neverthless required to demonstrate.

So far as our research has disclosed, no State has ever before required as a condition for licensure in one calling a demonstration of knowledge of a different calling, specifically recognized as such, nor has any State provided that examination papers for licensure in one calling be prepared by experts in a different calling, specifically so recognized.

Commenting on the opinions of the New York courts: Both emphasize that "the statute has conferred on chiropractors privileges which we have held they could not claim as a matter of constitutional right." 4a; 11a. But *England* has ruled that the privileges can be claimed as a matter of constitutional right, at least to the extent of putting the State on its proof.

Special Term said that chiropractors could be compelled to "show *some* knowledge of anatomy", etc. 4a. But the

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* We are advised by counsel in the *England* case that the trial has not yet taken place and that meanwhile, by agreement with the State, chiropractors are practicing without interference.

question is, can they be compelled to show the *same* knowledge as candidates for medical licenses authorizing the treatment of any disease or injury by any means or method?

Appellees have urged that *Fife* and other decisions of this Court are authority against the "compartmentalization of medical science". There are several answers. (1) It is New York that has "compartmentalized" chiropractic, but has inconsistently required demonstration of knowledge of the diseases and techniques of a different "compartment" as a condition of admission to the chiropractic "compartment". (2) *England* has ruled that a State must produce evidence; it cannot forbid "compartmentalization" "with no showing or proof". (3) The decisions cited by appellees were on evidence, not on pleadings. In particular, *Stuart* v. *Wilson*, 211 F. Supp. 700 (N. D. Tex.), affirmed on motion, 371 U. S. 576, was tried after the Fifth Circuit, following *England*, reversed a judgment of dismissal entered on motion, 293 F. 2d 914.

Conclusion.

The Court has jurisdiction. The federal questions are substantial.

Dated: New York, N. Y.
August 17, 1964

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APPENDIX A.

Opinion of Donohoe, *J.*, at Special Term (court of first instance)

Defendant's motion to dismiss the complaint is granted. Plaintiff's motion for a preliminary injunction is, accordingly, denied.

The complaint in this action sets forth nine causes of action on behalf of various persons who are chiropractors. The complaint demands judgment declaring that certain portions of Article 132 of the Education Law which require examinations as a prerequisite to licensing chiropractors are unconstitutional. The main thrust of the complaint is directed at the subject matter to be covered by the examinations and is based upon allegations to the effect that (1) subject matter is covered in the examinations which is not included in the practice permitted chiropractors under law, (2) subject matter is included in examinations which is not required of other classes of persons performing the same functions, (3) the legislation contains limitations which are discriminatory in other ways. Plaintiffs claim that a considerable portion of the act is arbitrary, unreasonable and discriminatory.

Specifically, it is alleged to be an unreasonable discrimination that chiropractors of less than two years practice experience are required to take the same examination given applicants for medical certificates in anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; that chiropractors of between two and seven years experience must take similar examination; that chiropractors who have practiced between seven and fifteen years must take an examination in fundamentals of anatomy and physiology, prepared by persons who are not qualified chiropractors; that all applicants must take an examination in the use and effects of X-ray, when the same examination is not required of doctors of medicine, dentists, podiatrists or osteopaths and finally, that an unreasonable distinction is drawn at to persons who have practiced chiropractic for longer peri in that the subjects of which examination

are waived is not within the scope of their usual practice activities in any event.

All of the allegations of the complaint are, of course, given full credence on this motion for judgment on the pleadings. Schmidt *v.* Rebhann, 108 N. Y. S. 2d 441. The sole question is the sufficiency of the complaint to allege the unconstitutionality of the disputed statutes.

The central question here is the appropriateness of the legislation in question as regulation of the licensing of chiropractors. Dent *v.* West Virginia, 129 U. S. 114. Plaintiff's contention is, in the main, that the examinations are a test of medical, rather than chiropractic knowledge, and are therefore inappropriate.

In examining the question, the Court will bear in mind the basic doctrine that a legislative enactment carries with it a strong presumption of constitutionality, that is, it is presumed to be supported by facts known to the legislature. Lincoln Building Associates *v.* Barr, 1 N. Y. 2d, 413; United States *v.* Carolene Products Co., 304 U. S. 144 (152); South Carolina Highway Dept. *v.* Barnwell Bros., 303 U. S. 177.

The extension of legislative power into the regulation of greater areas of public interest, health and safety is too well recognized to be contradicted. The licensing power has been extended into widened areas. Regulation of the sale of milk has been established in decisions confirming that the effect upon public interest is the criterion of proper regulation, (Matter of Elite Dairy Products *v.* Ten Eyck, 271 N. Y. 488) where regulation is reasonably related to safeguarding the public and is not so lacking in reason for its promulgation that it is essentially arbitrary. Matter of Stracquadiano *v.* Department of Health, 285 N. Y. 93 (97) and the cases cited therein.

The power of the legislature to require proof of competence in a given field which will affect public interest has been adequately demonstrated. People ex rel. Nechamcus *v.* Warden, etc., 144 N. Y. 529 (536), Paterson *v.* University of the State of New York, 244 N. Y. S. 2d 394, subject always to judicial review to determine whether regulation

by license served the public interest, Hauser *v.* North British and Mercantile Insurance Company, 206 N. Y. 455 (461) and to the prohibition against delegation of legislative power to administrative officers. Seignious *v.* Rice, 273 N. Y. 44 (49).

In the process of regulation and control there does not exist any absolute prohibition against selection between classes. The legislature may select, unless it can be demonstrated that its purpose in discriminating was to favor one business over another. Schacht *v.* City of New York, 243, N. Y. S. 2d 272 (280). The mere fact that one group exercising a function may be required to obtain licenses while another exercising similar ones is exempt is not sufficient to permit the conclusion that control of the one constitutes unequal protection proscribed by law. Berkowitz *v.* Wilson, 118 N. Y. S. 2d 291. Nor does the doctrine of equal protection of laws mandate the constant and perfect balancing of burdens in our society. Mid State Freight Lines *v.* Bates, 279 A. D. 451.

In this case, the Court is presented with a legislative enactment which (1) requires chiropractors to be licensed and (2) established the standards under which they shall be licensed and may practice. The legislation is specific in this, prescribing, as it does, the subjects of examinations, and not deferring to any administrative officer the policy making function of setting up criteria.

The complaint and the affidavit and the memoranda supplied to the Court have brought out certain salient truths, relevant to this decision. The prime one is that chiropractors treat the sick, by a process of removal of spinal sublaxation in order to permit neural processes to perform their normal functions. Failing in this, as they state they sometimes do, they refer patients to physicians or surgeons. In their own limited diagnostic techniques, having to do only with juxtaposition of vertebrae, they use X-ray. This is a large contributing factor in total radiation problems which have otherwise come before our Courts. Chiropractic Association *v.* Hilleboe, 12 N. Y. 2d, 109.

The legislature was warranted in not taking chances, and in requiring chiropractors to prove their knowledge of the use and effects of X-rays, and to require that they show some knowledge of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis as specified in Article 132. The legislature is not bound to prohibit every use of X-rays in order to make a prohibition effective where it is most needed, Radice *v.* New York, 264, U. S. 292, 297 298 The exercise of legislati e discretion exhibited in this case in adopting a different attack, upon an evil clearly proved to exist, is not subject to judicial re-examination. Williams *v.* Mayor of Baltimore, 289 U. S. 36, 42. It is not the function of this Court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. The legislature was not under the duty to cover the whole field of possible abuses in order to strike at what it deemed the most flagrant. The challenged statute has conferred on chiropractors privileges which the Court of Appeals has held they could not claim as a matter of constitutional right. This is ample to meet the challenge that it is unconstitutional.

Submit order in accordance with this decision.

Dated: March 27, 1964
Cold Spring, New York

JOHN P. DONOHOE, *J. S. C.*

APPENDIX B.

Opinion of Court of Appeals (Dye, J.)

Following *Chiropractic Assn. of N. Y.* v. *Hilleboe* (12 N Y 2d 109 [decided December 31, 1962]), the Legislature enacted Article 132, Education Law, entitled "Chiropractic" (L. 1963, chs. 780-781, effective July 1, 1963). It was a new, complete, comprehensive and self-contained enactment for the licensing of the practice of chiropractic in New York State.

The plaintiffs are suing on behalf of themselves and all other chiropractors in New York who are similarly situated, for a judgment declaring the Act or portion thereof invalid as to them, on constitutional grounds, and for injunctive relief.

The Appellate Division, Second Department, has unanimously affirmed without opinion an order of the Westchester County Supreme Court (Donohoe, J.) which granted without a hearing defendant's motion to dismiss the complaint for insufficiency, it being of the view that Article 132 is in all respects constitutional and valid. The appeal is here as of right on constitutional grounds.

The complaint alleges grievances affecting chiropractors, falling generally into nine groups, the specifications of which, for purposes of this appeal, need not detain us, since the primary dispositive and overall issue is whether the complaint is sufficient to allege the unconstitutionality of the statute, that is, whether the statute, as an exercise of the police power in furtherance of the public health, is unreasonable or, in brief, is the legislation appropriate to the licensing of chiropractors?

These plaintiffs and other candidates for licenses to practice chiropractic and those classes of chiropractors presently practicing who are required to do so, took examinations under date of April 7 and 8, 1964 in anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis. Alleging that they would be "irreparably injured by the humiliation and loss of reputation resulting

from their failure to pass" said examination, plaintiffs then moved for a stay to restrain the Commissioner of Education and the Board of Regents from marking the examinations pending the determination of the appeal herein.

The challenged legislation provides that it shall be a misdemeanor for any person not licensed as provided in Article 132 of the Education Law to practice chiropractic after October 1, 1964 (Education Law, §6561[1][d]).

Section 6552 (subd. 1) requires *all* applicants (except certain classes with prior practice and experience, who may be blanketed in under the grandfather clause, and certain others with prior experience, but not to be covered in) to pass written examinations administered by the Department in clinical chiropractic analysis and in X-ray as it relates to chiropractic analysis and the practice of chiropractic, and written examinations in the following basic subjects: anatomy, physiology, chemistry, hygiene, bacteriology, pathology and the diagnosis and use and effects of X-ray.

It also provides (subd. 2) that in respect to the basic subjects, the Department shall use the questions prepared for the same subjects in the examinations pursuant to §§6507 and 6508, Education Law, which sections refer to examinations given to applicants for licenses for the professional practice of medicine, osteopathy and physiotherapy. This requirement, the plaintiffs allege in different ways, depending on the class group in which the plaintiffs fall and as between the groups, is grossly unfair to present practitioners, and applicants for licenses, and amounts to discrimination contrary to due process and equal protection, for the reason that in addition to having satisfied preliminary qualifications as to citizenship, moral character and schooling, chiropractors of less than 2 years' practice experience are required to take the same examinations in basic subjects given applicants for medical certificates (§6556, subd. 3, pars. a, b); that chiropractors of between 2 and 7 years' practice experience must take a similar examination and those between 7 and 15 years' practice experience an examination prepared by the Department "in the fundamentals . . . of anatomy and physiology" (§6556, subd. 2, pars. a, b)

and those with over 15 years' practice experience are to be admitted without examination in the basic subjects. This, they contend, points up a distinction as between "groups" of chiropractors and between chiropractors and other groups licensed to practice in the field of human health, since the statute also requires all applicants to pass "examination[s] prepared by the board" in the practice of chiropractic and an examination in "the use and effects of X-ray" (§6556, subd. 1, par. g). It is contended that requiring all applicants for a chiropractic license to take and pass an examination in the use and effects of X-ray when the same is not required by applicants for a medical certificate, dentistry and osteopathy is an unreasonable discrimination, as the latter also practice in the field of human health.

The main thrust is directed to the disabilities explicitly imposed on licensees in the practice of chiropractic, which they contend points up the inappropriateness and the inherent unfairness of the examination, viz: "The practice of chiropractic", according to the statute, "means a method of detecting and correcting, by manual or mechanical means essential to the practice of chiropractic, structural imbalance, distortion, or subluxation in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxations of or in the vertebral column." (Education Law, §6550, subd. 4). The statute further makes it clear that the practice of chiropractic, as above defined, "is hereby declared not to be the practice of medicine, or osteopathy, or physiotherapy within the meaning of the laws of the state of New York defining the same," (§6558, subd. 2). It is further provided by subdivision 3 that a license to practice chiropractic shall not permit the holder thereof:

> "a. to practice obstetrics, psychiatry or any medical, surgical or paramedical specialty or subspecialty;

b. to perform surgery of any kind or to reduce fractures or dislocations;

c. to treat for any of the following conditions: any infectious diseases such as pneumonia, any communicable diseases listed in the sanitary code of the state of New York, any of the cardio-vascular-renal or cardio-pulmonary diseases, any surgical condition of the abdomen such as acute appendicitis, or diabetes, or any benign or malignant neoplasms.

d. to prescribe, administer, dispense or use in his practice biologicals, drugs, medicines, sera, vaccines or hormones;"

Because of the limitation thus placed upon the practice of a licensed chiropractor, the requirement respecting an examination in the named "basic subjects" as well as the requirement to pass an examination in the use and effects of X-ray, according to the complaint, is discriminatory in its application since, by its terms, chiropractors presently practicing, depending on the period engaged, may be licensed without having to pass an examination in these fields; others, upon passing an examination in "the fundamentals of anatomy and physiology", while still others must receive passing marks in the several designated "basic subjects".

Requiring chiropractic examinees to pass an examination in the use and effects of X-ray is denounced as being uneven and discriminatory in its application since others engaged in the field of public health—such as applicants for licenses to practice medicine, dentistry, podiatry and osteopathy—are not so required, thereby denying these plaintiffs and others similarly situated equal protection of the law as guaranteed by section 11 of Article 1 of the New York State Const. and the Fourteenth Amendment to the Federal Constitution.

This phase of the constitutional challenge requires no lengthy comment. The need to regulate and confine the

use of X-ray to qualified personnel was all explored in *Chiropractic Assn. of N. Y.* v. *Hilleboe, supra.* There, Regulation 19 of ch. XVI of the Sanitary Code (prohibiting the application of radiation to a human being by anyone not licensed or otherwise authorized to practice medicine, dentistry, podiatry or osteopathy—but not prohibiting the use of radiation by a technician, nurse or other person—unless such use is directed or ordered by a person so licensed or authorized to practice for use in his field) was upheld as a valid delegation of legislative power and not unconstitutional. Since the use of X-ray relates to a field where chiropractors will be practicing, it is neither unreasonable nor inappropriate to require chiropractic license applicants to demonstrate a proficiency in that area. In short, the provisions requiring an examination in the use and effect of X-ray are not violative of the equal protection clause.

The contention aimed at the unconstitutionality of the statute requiring examination in the basic subjects pursuant to subdivision 2 of section 6552 of the Education Law ("the department shall use the questions prepared for the same subjects in the examination pursuant to sections sixty-five hundred seven and sixty-five hundred eight of this title"), is more subtle. Chiropractic—dealing as it does with the detection and correction of "structural imbalance, distortion, or subluxation in the human body for the purpose of removing nerve interference and the effects thereof," (§6550, subd. 4) on the nervous system—is intimately and inextricably connected with human health and well within the area of the State's police power. In fact, plaintiffs concede that the fields of healing art, medicine and chiropractic —though diverse—may and sometimes do overlap. Statutory validity is favored by a presumption of constitutionality (*Lincoln Building Assoc.* v. *Barr*, 1 N. Y. 2d 413; *Johnson* v. *The City of New York*, 274 N. Y. 411; *South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U. S. 177; *United States* v. *Carolene Products Co.*, 304 U. S. 144) and it is also a ma...n of the judicial function that "courts

do not substitute their social and economic beliefs for the judgment of legislative bodies" (*Ferguson* v. *Skuppa*, 372 U. S. 726, 730). And even when error is committed in the exercise of legislative discretion, the courts may not correct it (*Williams* v. *Mayor and City Council of Baltimore*, 289 U. S. 36). I do not apprehend, and neither did the courts below, that it is the function of this court to determine whether "the public policy that finds expression in legislation of this order is well or ill conceived" (opinion below, 43 Misc. 2d 14, 17).

"The power of the legislature", as the learned Justice at Special Term put it, "to require proof of competence in a given field which will affect public interest has been adequately demonstrated. *People ex rel. Nechamcus* v. *Warden etc.*, 144 N. Y. 529, 536 • • • subject always to judicial review to determine whether regulation by license serves the public interest, *Hauser* v. *North British and Mercantile Insurance Co.*, 206 N. Y. 455, 461 and to the prohibition against delegation of legislative powers to administrative officers. *Seignious* v. *Rice*, 273 N. Y. 44, 49" (43 Misc. 2d 16).

Here, we are dealing with the sufficiency of the complaint to state unconstitutionality of a duly enacted statute for the licensing of the practice of chiropractic. It was enacted after we had said it did not transcend the police power of the State for the Public Health Council to rule that the unfamiliarity of chiropractors with the effects of radiation in the wholesale use of X-ray constituted a danger to the public health (*Chiropractic Assn. of N. Y.* v. *Hilleboe*, *supra*). The conditions requisite to obtaining a license are specific, detailed and comprehensive. The imposition of a new requirement for the continued practice of a profession previously carried on without the need of such requirements does not violate the Constitution (*Gray* v. *Connecticut*, 159 U. S. 74). Grandfather clauses are common incidents of licensing a recognition of practical experience in the practice of chiropractic for a period of time—a perfectly reasonable basis to exempt from the necessity of taking examinations (4 A L R 2d 670). Nothing turns on the circum-

stance that the Legislature excused under the grandfather clause some and not others from passing the basic subject test. Neither can it reasonably be said that requiring an applicant for license to practice chiropractic to pass tests in basic subjects constitutes an arbitrary and unreasonable exercise of legislative power. While it is true that the statute draws a distinction between the practice of medicine, osteopathy or physiotherapy, as defined by the applicable statute, and the practice of chiropractic and, in so doing, defines and limits the rights of licensed chiropractors in fields of practice deemed as belonging to the practice of medicine, osteopathy or physiotherapy (§6558), the practice of chiropractic is nonetheless one that deals with human health which has always been regarded and treated as a matter of public concern. "It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health." (*Watson* v. *State of Maryland*, 218 U. S. 173, 176).

Chiropractic, having to do with the health and well-being of the people, requires a high degree of general knowledge and technical skill and is a field where the power of the state may well be asserted to make sure that only properly qualified persons shall undertake its responsible and difficult duties. As the Justice below pointed out, the challenged statute has conferred on chiropractors privileges which we have held they could not claim as a matter of constitutional right (*Chiropractic Assn. of N. Y.* v. *Hilleboe, supra*). This is ample to meet the challenge that the statute is unconstitutional.

The order appealed from should be affirmed, without costs.

* * * * * *

Order affirmed, without costs. Opinion by Dye, J. All concur.

APPENDIX C.

Education Law.

Article 131.

Medicine; Osteopathy; Physiotherapy.*

§6501. Definitions

As used in this article:

1. "Board" means the board of medical examiners of the state of New York.

* * * * * *

4. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.

§6507. Questions

The board shall submit to the department, as requested, lists of suitable questions for thorough examination in anatomy, physiology, preventive medicine and public health, chemistry, surgery, obsterics, gynecology, pathology, micro-biology, and medicine and diagnosis. From these lists the department shall prepare question papers for all such subjects, which at any examination shall be the same for all candidates, except that the examination may be divided as provided in section sixty-five hundred six.

Article 132.

Chiropractic.

§6550. Definitions

As used in this article:

1. "Board" means the state board of chiropractic examiners of the state of New York.

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* Appellants do not challenge any provision of Article 131 as such; it is set forth here because §6552 of Article 132 incorporates by reference §6507 of Article 131.

2. "License" means a license granted and issued by the department under this article to practice chiropractic.

3. "Resident course" means a course of study wherein personal attendance is required at classes in a chiropractic school or college.

4. "The practice of chiropractic" means a method of detecting and correcting, by manual or mechanical means essential to the practice of chiropractic, structural imbalance, distortion, or subluxation in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxations of or in the vertebral column.

5. "Department" means the education department of the state of New York.

§6552. Examination of applicants

1. All applicants shall be required to pass written examinations in clinical chiropractic analysis, X-ray as it relates to chiropractic analysis, and the practice of chiropractic, and a written examination in the following basic subjects: anatomy, physiology, chemistry, hygiene, bacteriology, pathology, diagnosis and the use and effects of X-ray.

2. Examinations shall be administered by the department. The board shall prepare and submit to the department, as required, lists of questions for the examinations in clinical chiropractic analysis, the use and effects of X-ray, and practice of chiropractic. The department may select questions from such lists for such examinations. In the examinations in the basic subjects the department shall use the questions prepared for the same subjects in the examination pursuant to sections sixty-five hundred seven and sixty-five hundred eight of this title.

3. Following each examination the board shall examine and rate the papers in chiropractic analysis, the use and

effects of X-ray, and the practice of chiropractic examinations and shall transmit to the department an official report, signed by its chairman and secretary, stating the rating of each applicant. Such report shall include the appropriate questions and answers. The department shall examine and rate the papers in the basic subject examinations, shall record the rating of each applicant in each subject and shall determine whether the applicant has successfully passed all examinations. If a candidate fails the examinations, he may be re-examined on the part or parts he has failed on payment of a fee of fifteen dollars. There may be no more than two such re-examinations.

§6554. The state board of chiropractic examiners

1. Within six months after this article takes effect, the regents shall, upon the recommendation of the commissioner, appoint a board of chiropractic examiners consisting of seven members, four of whom shall be chiropractors, one of whom shall be a duly licensed doctor of medicine who has practiced in New York state not less than ten years, and one of whom shall be a duly licensed doctor of osteopathy who has practiced in New York state not less than ten years, and one of whom shall be an educator in one of the basic subjects who holds a doctorate or equivalent degree in such subject.

Each of the chiropractic members of the board shall be:

a. a resident course graduate chiropractor, which course shall not be less than two school years of formal study, with at least ten years of experience in the practice of chiropractic;

b. a resident of this state;

c. a citizen of the United States; and

d. except in the case of the members first appointed to such board, the holder of a license issued pursuant to this article.

2. The term of office of the members of the board shall be three years, provided, however, that of the members first appointed, three shall be appointed for a term which shall expire on July thirty-first, nineteen hundred sixty-five; three for a term which shall expire on July thirty-first, nineteen hundred sixty-six; and one for a term which shall expire on July thirty-first, nineteen hundred sixty-seven.

Before entering upon his term of office each member of the board shall file with the secretary of state the constitutional oath of office. Vacancies in the membership of the board, however created, shall be filled through appointment by the regents for the unexpired term. The regents may remove any members of the board for professional or official misconduct, incompetency or neglect of duty.

§6556. Present practitioners

1. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to March first, nineteen hundred sixty-four, and who:

a. is twenty-one years of age or over;

b. is a citizen of the United States or who has duly declared his intention of becoming a citizen in accordance with law;

c. is a graduate of a resident course in chiropractic, consisting of not less than two school years of formal study;

d. is of good moral character;

e. is a resident of this state and has been a resident for at least one year prior to July first, nineteen hundred sixty-three;

f. has engaged for the period of at least the fifteen years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

g. passes an examination prepared by the board in the practice of chiropractic and an examination in the use and effects of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

2. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to March first, nineteen hundred sixty-four, and who at that time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section and who:

a. has engaged for the period of at least the seven years, and not more than the fifteen years, immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

b. passes an examination prepared by the department in the fundamentals of anatomy and physiology, and an examination prepared by the board in chiropractic and in the use and effects of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equip-

ment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

3. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to March first, nineteen hundred sixty-four, and who at the time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section, and who:

a. has been engaged for the period of at least the two years, and not more than the seven years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state;

b. passes an examination prepared by the department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology, and diagnosis; and

c. in addition to such written examination, passes a written examination prepared by the board in the use and effects of X-ray and a practical examination prepared by the board in chiropractic.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray

may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

4. Any person who files his application prior to March first, nineteen hundred sixty-four and who meets the requirements of paragraphs a, b, c, d and e of subdivision one of this section, and who has been engaged in the practice of chiropractic in this state for a period of less than the two years prior to July first, nineteen hundred sixty-three, shall be eligible for examination as provided in section sixty-five hundred fifty-two and shall be licensed upon successfully passing such examination.

5. Service in the armed forces of the United States during any portion of the two-year period prior to July first, nineteen hundred sixty-three shall be deemed equivalent to engagement of the practice of chiropractic in this state, provided that the applicant was engaged in such practice in this state at the time of his induction into the said armed forces. Any person having the qualifications specified in this section and who shall be in the armed forces of the United States during any portion of the eight-month period after July first, nineteen hundred sixty-three shall be permitted to make application as provided in this section within six months after the date of his discharge from the service.

6. All students who are engaged in resident course in chiropractic on April first, nineteen hundred sixty-three,

who complete a resident course of not less than eight months each and not less than four thousand hours, shall be eligible for examination and to receive a license as provided in section sixty-five hundred fifty-two and sixty-five hundred fifty-three.

7. Application for licenses under this section shall be made on forms prescribed by the department and shall be accompanied by such documentary evidence as it may require.

8. If a candidate fails an examination, required by this section, he may, within one year from the date of such examination have two re-examinations, for which an additional fee of fifteen dollars shall be required.

§6558. Rights of licensed practitioners

1. Each duly licensed practitioner who shall have complied with the provisions of this article, shall have the right within this state to practice chiropractic as defined in this article.

2. The practice of chiropractic, as herein defined, is hereby declared not to be the practice of medicine, or osteopathy, or physiotherapy within the meaning of the laws of the state of New York defining the same, but nothing in this article contained shall be construed to restrain or restrict any licensed physician or osteopath, or physiotherapist in the practice of his profession.

3. A license to practice chiropractic shall not permit the holder thereof:

a. to practice obstetrics, psychiatry or any medical, surgical or paramedical specialty or sub-specialty;

b. to perform surgery of any kind or to reduce fractures or dislocations;

c. to treat for any of the following conditions: any infectious diseases such as pneumonia, any communicable diseases listed in the sanitary code of the state of New York, any of the cardio-vascular-renal or cardio-pulmonary diseases, any surgical condition of the abdomen such as acute appendicitis, or diabetes, or any benign or malignant neoplasms;

d. to prescribe, administer, dispense or use in his practice biologicals, drugs, medicines, sera, vaccines or hormones;

e. to use any diagnostic or therapeutic methods involving chemical or biological means or the use of electrical devices, except those devices approved by the board as being essential to the practice of chiropractic; or

f. to use radio-therapy, fluoroscopy, or any form of ionizing radiation except X-ray which may be used only as provided in this subdivision; (i) X-ray shall only be used for the purposes of chiropractic analysis; (ii) such use of X-ray shall be confined to persons over the age of 18; and (iii) the area of such X-ray exposure shall not extend below the level of the top of the first lumbar vertebra. The requirements and limitations with respect to the use of X-ray by chiropractors shall be enforced by the state commissioner of health and he is authorized to promulgate rules and regulations to carry out the purposes of this subdivision. Chiropractors shall retain for a period of three years all X-ray films taken in the course of their practice, together with the records pertaining thereto, and shall make such films and records available to the state commissioner of health or his representative on demand.

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IN THE

Supreme Court of the United States

No. 402—October Term, 1964

HENRY WASMUTH, ROBERT A. DAVIS, DANIEL McGAURN and LEONARD FELDMAN, suing on behalf of themselves and all other chiropractors in the State of New York who are similarly situated,

Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, and THE REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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(1)

The appeal to this Court challenges the right of the State of New York to impose certain conditions upon the right of chiropractors to practice chiropractic. The legislation (L. 1963, ch. 780 and ch. 781) followed closely on the decision in *Chiropractic Assoc. of N. Y.* v. *Hilleboe, Com'r. of Health*, 12 N. Y. 2d 109, 187 N. E. 2d 756 (1962), in which the opinion referred at some length to the want of knowledge of medicine, and the poor clinical judgment, exhibited by chiropractors. These persons had never previously been required to take examinations and secure licenses, and the

Legislature lost no time in remedying the situation which the cited case had so heavily emphasized.

(2)

The appellants argue that a trial of the issues should have been had. But in New York State the researches of geneticists had been carried on intensively since Hiroshima and Nagasaki and had focussed attention upon one of the gravest ills attendant upon the practice of chiropractic by persons ignorant of medicine. The researches of geneticists (some of whom had testified at very great length in *Chiropractic Assoc.* v. *Hilleboe, supra*) had established beyond doubt that the use of X-rays upon the lower spine had the effect of splitting chromosomes, injuring irreparably the human organs of reproduction, and leading to monstrous births. The Legislature, framing remedial legislation, had the right to go very far in requiring applicants for chiropractic licenses to demonstrate that they had a thorough knowledge of such basic subjects as anatomy, physiology, chemistry, bacteriology, pathology and, most important of all, knowledge of the use and effects of X-ray.

(3)

Recent decisions of this Court in refusing to disturb State Court decisions upholding the regulation of the practice of the healing arts have shown an undeviating tendency to support the State authorities. We call attention to the following cases:

Louisiana State Board of Medical Examiners v. *Fife*, 162 La. 681, 111 So. 58 (1926), aff'd 274 U. S. 720 (1927);

Davis v. *Beeler*, 185 Tenn. 638, 652, 207 S. W. 2d 343, 349 (1948), app. dis. 333 U. S. 859 (1948);

Dantzler v. *Callison*, 230 So. Car. 75, 94-95, 94 S. E. 2d 177, 188 (1956), app. dis. 352 U. S. 939 (1956); *Stuart* v. *Wilson*, 211 Fed. Supp. 700 (N. D. Tex., 1962), motion to affirm granted 371 U. S. 576 (1963).

(4)

These cases show an established public policy against the compartmentalization of medical knowledge, and an awareness on the part of legislators that not only must the applicant know his own subject but he must *know the limitations of his own system of therapy.*

In the first of the group of four cases cited above, the Supreme Court of Louisiana, whose judgment this Court affirmed, said (*Louisiana State Board of Medical Examiners* v. *Fife*, 162 La., at p. 686; 111 So., at pp. 60-61):

> "The Legislature, however, in defining these requirements, cannot prescribe, as a condition to the right to practice, knowledge of a subject which bears no relation to the practice of medicine. *Dent* v. *West Virginia* [129 U. S. 114] *supra*. But this does not mean that the Legislature, in exercising its power to prescribe the qualifications, which, in its judgment, one should possess to practice medicine, must make requirements such as to provide for every school of medicine that may exist, by requiring of those belonging to each particular school a knowledge only of those subjects, which the theory of healing, advocated and put in operation by each school, requires. Were it otherwise, the Legislature would be greatly hampered in the exercise of its power to protect the general health and the public from imposition and fraud. Every group of men who might get together and evolve some system, designed to restore health, would be entitled to recognition, and all that could be required of them would be evidence of good character and a knowledge of such subjects as their particular school seemed to require, although the Legislature might deem with reason a knowledge

of such subjects wholly insufficient to entitle any one to treat the sick. However, the Legislature is not hampered by any such restriction in the exercise of its power to protect the public health."

(5)

To the cases hereinbefore cited we may cite others the basic premise of which is that there is a presumption that the Legislature has, before passing a bill, satisfied itself of the existence of facts necessary to support the legislation. Typical cases are these:

United States v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938);

South Carolina State Highway Dept. v. *Barnwell Bros., Inc.*, 303 U. S. 177, 191 (1938);

I. L. F. Y. Co. v. *Temporary State Housing Rent Comm.*, 10 N. Y. 2d 263, 269 (1961).

This Court has, particularly in passing upon statutes designed to protect the public health, acknowledged that "there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with". *Manigault* v. *Springs*, 199 U. S. 473, 480-481 (1905). And see *East River Savings Bank* v. *Hahn*, 326 U. S. 230, 232 (1945).

(6)

The appellants have exaggerated the effect of the *England* group of cases at p. 12 of the Jurisdictional Statement. This Court said nothing about the merits of the chiropractors' claims. The problems were largely procedural. But the litigation boomeranged against the chiropractors, for when the trial which this Court ordered was had in the State court, and brought up for review in the intermediate

appellate Court, the latter Court said (*England* v. *Louisiana State Board of Medical Examiners,* 126 So. 2d 51, 56 [1961; not officially reported]):

> "[3] We believe, therefore, that the question of whether or not any beneficial results may be obtained by treatment of chiropractic is, to say the least, highly controversial and the question as to the licensing of a person to practice chiropractic is one that addresses itself to the Legislature and their failure to license chiropractic, as such, is one peculiarly within their wisdom * * *".

The report states that the Louisiana Supreme Court denied certiorari; and in alluding to the case in *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964), footnote 4 on page 414, this Court said: "Appellants made no attempt to obtain appellate review of the state decision in this Court."

CONCLUSION

The motion to dismiss should be granted for want of a substantial federal question; or, in the alternative the judgment appealed from should be affirmed.

August 20, 1964

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Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 402—October Term, 1964.

Henry Wasmuth, Robert A. Davis, Daniel McGaurn and Leonard Feldman, suing on behalf of themselves and all other chiropractors in the State of New York who are similarly situated,

Plaintiffs-Appellants,

against

James E. Allen, Jr., as Commissioner of Education of the State of New York, and The Regents of the University of the State of New York,

Defendants-Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Point I. *Chiropractic Association of New York* v. *Hilleboe*, 12 N. Y. 2d 109, dealt entirely with X-ray. That decision upheld the validity of a regulation of the Public Health Council of New York limiting the use of X-ray by chiropractors. It turned in no respect on "want of knowledge of medicine", a subject not mentioned in the opinion.

In the present case the Court of Appeals cited *Chiropractic Association* as authority for the proposition that chiropractors should know X-ray because they use it (Jurisdictional Statement, page 9a). But that proposition does not support—on the contrary, it detracts from—the conclusion that chiropractors should be denied the right to

prove that they do not need to know either (1) the use and effects of drugs, medicines, sera, hormones, or electrical devices which they do not, and are forbidden to, use, or (2) the treatment of infectious diseases, cancer, diabetes, etc., which they do not, and are forbidden to, treat. The Court of Appeals did not cite *Chiropractic Association* for that conclusion, but relied on the general authority of legislative bodies (Jurisdictional Statement, pages 9a-11a).

Nor does the proposition that chiropractors should know X-ray because they use it establish that chiropractors should be denied the right to prove that others use X-ray as much or more than they, and therefore, should also be required to know its "use and effects". In short, to prove that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched". *Watson* v. *Maryland*, 218 U. S. 173, 179. Indeed, if X-ray is as dangerous as appellees say it is, it would seem clear that anyone who uses X-ray should have that knowledge.

POINT II. There is no "presumption that the Legislature has, before passing a bill, satisfied itself of the existence of facts necessary to support the legislation". Quite the contrary, the decisions of this Court cited by appellees turned on evidence, not on presumptions. No evidence has ever been offered in any court or legislative body to show why chiropractors must have "thorough" medical knowledge of diseases they do not and are forbidden to treat and of techniques they do not and are forbidden to use.

This Court has repeatedly insisted, as did the Fifth Circuit in *England*, the "facts should be accurately ascertained and weighed" in constitutional cases, *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 549. Cf. *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 213.

POINT III. Appellees' lack of comprehension of the *England* decisions is indicated by their statement on page 4, "when the trial which this Court ordered was had in the State court." As this Court ordered the trial in January, 1964, and as the State Court litigation ended in 1961 (126 So. 2d 51), obviously the trial ordered by this Court was not the trial in the State Court. We noted at page 14 of the Jurisdictional Statement that the trial ordered by this Court has not yet been held, and that meanwhile the chiropractors are practicing without interference, according to information supplied by counsel in that case.

Appellees cited the Louisiana decision that licensing chiropractic is "peculiarly within the wisdom of" the Legislature (page 5).

The legislatures of 45 states have licensed chiropractic; in three states chiropractors are neither licensed nor interfered with; in Louisiana and New York, medical knowledge is required as a condition of practicing chiropractic, and the courts of the United States have said, with the sanction of this Court, that Louisiana must prove the propriety of this condition. Our claim that New York should also be so required, does not, we submit, come within the doctrine of *Zucht* v. *King*, 260 U. S. 174.

Respectfully submitted,

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Dated: New York, N. Y.
August 28, 1964

ARNOLD G. FRAIMAN,
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